TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 236.

EDWARD H. LOVE, PLAINTIFF IN ERROR,

vs.

ANNIE FLAHIVE AND ANDREW J. LANSING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED MARCH 23, 1906.

(20,147.)

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a In the Supreme Court of the State of Montana.

EDWARD H. LOVE, Appellant,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Respondents.

Transcript on Appeal from the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula.

1 In the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula.

EDWARD H. LOVE, Plaintiff,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendants.

Edward H. Love, plaintiff in the above entitled action, complains of the defendants therein, and for cause shows unto this Hon. Court:

That at all the dates and times hereinafter mentioned he was and now is a citizen and resident of the County of Missoula, and State of Montana, and a citizen of the United States of America, and as such in every respect duly and lawfully entitled and qualified to settle upon, occupy and improve a homestead upon the public domain of the said United States, and to enter the same and obtain and receive a United States patent therefor under and in pursuance of the laws of the said United States, and that one Michael Flahive was up to the time of his decease hereinafter stated likewise a citizen of the said United States and as such in all respects duly and lawfully entitled and qualified to settle upon, occupy and improve a homestead upon the public domain of the said United States, and to enter the same and obtain and receive a patent therefor, and that the said defendant, Annie Flahive, up to the time of the decease of the said Michael Flahive was his wife, and ever since said time hath been and now is the widow of said deceased.

II.

That in the month of May, 1882, this plaintiff settled upon, occupied and improved the East half of the Southeast quarter of Section Twenty-two (22), and the East half of the Northeast quarter of Section Twenty-seven (27), Township Twenty (20) North,
2 of Range -six (26) West, in the County of Missoula, then Territory now State of Montana, being contiguous legal subdivisions one mile long and one-quarter of a mile wide, for the purpose in *good faith* of entering the same and obtaining a United States patent therefor as a homestead; that said land was at the time unsurveyed public lands of the said United States, and continued so to be up to the date hereinafter mentioned, and as such subject to settlement, occupancy and improvement as aforesaid; and that this plain-

tiff in the year aforesaid, as he of right might and could do, erected a dwelling house thereon, and built a good and substantial fence around said land enclosing the same, with the exception of the north twenty acres thereof, and continuously occupied, possessed and improved the same up to the date hereinafter stated.

III.

That in the year 1888, said land was duly surveyed, and on the 11th day of December of said year, the plat of the survey of the Township in which the same is situated, duly and properly returned, approved and filed in the local land office at Helena City, Montana, being the district then comprising said land; that on the second day of January, 1889, and within the time required by law therefor, this plaintiff for the purposes hereinbefore stated duly made and executed the necessary affidavit and application to enter said land and obtain a patent therefor, and with that intention delivered the same to the officers of said local land office; that said application was rejected as to all that portion of said land lying in said Section Twenty-seven, on account of the claim thereto of the Northern Pacific Railroad Company under its grant from the said United States; and that this plaintiff duly appealed from said decision to the Hon. Commissioner of the General Land Office, and the claim of said Company was upon said appeal rejected, and said plaintiff's application sustained, which said decision is still in full force and effect.

3 IV.

That on the 14th day of June, 1889, and after said plaintiff had so deposited said affidavit as aforesaid, and for the purposes aforesaid, the said Michael Flahive during his lifetime filed with said local officers his affidavit and application, in due form of law, to enter as a homestead the Southeast quarter of Section Twenty-two, which embraced and included the said East half of the Southeast quarter of the land so sought to be entered by plaintiff as aforesaid, being the north eighty acres of said tract and comprising the sixty acres so possessed, occupied and fenced by this plaintiff as hereinbefore stated; that the officers of said land department found as a fact that the application of plaintiff and the said Michael Flahive now deceased were filed simultaneously on the said 14th day of June, 1889, and treated and considered the application of plaintiff as having been made at said date and not before, all of which will more fully appear by reference to the exhibits hereinafter mentioned.

V.

That during the proceedings had in said Land Department, and while said contest was still pending therein, the said Michael Flahive died, and thereafter the same was continued by the said Annie Flahive as the widow of said deceased; that such proceedings were had and done in said Land Department as that the application of plaintiff was finally erroneously rejected and the application of said de-

ceased sustained, and the said defendant, Annie Flahive, as the widow of said deceased, erroneously allowed and permitted to enter the said East half of the Southeast quarter of Section Twenty-two (22); Township Twenty (20) North, of Range Twenty-six (26) West, so settled upon, possessed and improved by plaintiff as aforesaid, and on the — day of December, 1899, issued to said defendant, Annie Flahive, a United States patent therefor, all of which plaintiff is informed and believes, and therefore alleges, was done and
4 caused to be done under a mistaken construction of the acts of congress applicable thereto, entitled "Pre-emption and Homestead, and the acts amendatory and supplemental thereto, and said land wrongfully and erroneously taken from plaintiff who in equity and good conscience was and still is entitled to the same, and wrongfully and erroneously awarded and granted to said defendant, Annie Flahive, who ever since has held and now holds the legal title thereto.

VI.

And for the purpose of showing to this Hon. Court the mistake and errors aforesaid, said plaintiff alleges that on the 14th day of August, 1890, in said local land office at Helena a hearing of said applications was had and an opinion rendered awarding to plaintiff the land in controversy as aforesaid; that said Michael Flahive appealed therefrom to the Hon. Commissioner of the general Land Office, and on July 26, 1892, the decision of said local officers was by him affirmed; that said Michael Flahive again appealed from the decision of said Commissioner to the Hon. Secretary of the Interior, and on the 12th day of January, 1894, said decision was duly affirmed; that on January 30, 1895, a motion was made by said defendant, Annie Flahive, as widow of said Michael Flahive, for a rehearing, based *solely* upon the alleged ground, "That Love had parted with any title and interest in the land in controversy by a sale of said premises to one Rundall, who had in turn sold to Flahive;" that said rehearing was granted upon said question alone, and upon said rehearing said local officers at Helena, Montana, on the 4th day of June, 1895, again decided in favor of this plaintiff and recommended that the original decision be adhered to; that said defendant, Annie Flahive, appealed therefrom again to the Hon. Commissioner of the General Land Officer, and on the 9th day of December, 1895, said decision of the local officers was again affirmed; that on the
5 20th day of March, 1895, said Commissioner, upon a motion for review, vacated the former decision upon the sole and only ground of the estoppel therein mentioned, which said decision was affirmed by the Hon. Secretary of the Interior on the 26th day of December, 1896, upon the grounds of said estoppel, and none other; that the findings of fact and conclusions of law, except in respect to said estoppel alone, awarded and granted the application of plaintiff, and in all other matters, facts and respects found him entitled to said land; a copy of which said findings are hereto attached, marked exhibits A, B and C, and made a part of this complaint, to which reference is made.

VII.

And plaintiff further shows unto this Hon. Court, that, inasmuch as it appears and is a fact that plaintiff was entitled to enter and obtain a patent for said land in controversy, but for the estoppel in said decision mentioned, plaintiff alleges that in that behalf the officers of said Land Department committed error and mistake in construing the said Acts of Congress, on account of which plaintiff was wrongfully and erroneously deprived of said land, and for the purpose of showing to the Court here more specifically and particularly said mistakes, and errors, plaintiff, on his information and belief, alleges:

That said officers of the Land Department erred in considering the fact as to whether the sale in said decisions mentioned was of said land in controversy or logs and in considering the application of plaintiff of April 5th, 1889, as immaterial, and in not finding upon said question; the officers of said Land Department erred in holding that whether said plaintiff sold said land or said logs, that is was conclusive evidences that said plaintiff at *that time,* in 1883, did not claim said land, and was estopped from thereafter claiming the same, and especially in holding that he was estopped on that ac-
6 count from claiming said land under his filing an application of June 14th, 1889, after said Michael Flahive had forfeited his claim to the same by a failure to file upon the same within three months from the approval and filing of said Township plats; that it was mistake and error in holding that said application of plaintiff after said forfeiture was unavailable and defeated by said estoppel, and that said estoppel tolled the neglect and failure of said Michael Flahive to make his application and filing within the time required by law; that the facts found do not constitute an estoppel in that there is no finding that said Flahive did any act or thing he would not have done to his injury or otherwise; that there is a manifest error and mistake in law in not holding that said Flahive forfeited all the rights he had including all rights under said estoppel or disclaimer, if any, by a failure to make his said filing and application within three months after the approval and filing of said plats; that there was manifest mistake and error in law in not holding under said findings that said land was subject to entry by plaintiff upon his said application and filing, and that said land passed to him under Section 2265, 2266 and 2274, of the Revised Statutes of the United States, and Section 3, of the Act of May 14, 1880, U. S. Revised Statutes, Vol. 21, page 140; and in not holding that said Flahive had forfeited all priority, right and claim to said land on account of the forfeiture aforesaid, under the preemption and homestead laws of the United States and laws supplemental and amendatory thereto; and plaintiff especially charges and alleges, that in holding as matter of law, that said disclaimer or estoppel was available to said Flahive who assisted in the building of said fence, or that it was intended to shut out any subsequent claim of plaintiff, either before or after said forfeiture, is unreasonable, inequitable and unjust to this plaintiff; and that the holding, as matter of law, by the

officers of the land department that said estoppel or disclaimer
7 excluded plaintiff of the right to reassert his said claim after such forfeiture and operated to defeat said forfeiture, was contrary to public policy and in direct conflict with the express provisions of the statutes aforesaid, and that there was manifest error under the facts found in not holding the alleged estoppel or disclaimer void and inoperative, that the said — by said Rundall to said Flahive, who purchased with a knowledge of a re-asserted claim by plaintiff, operated as a forfeiture, and abandonment by said Rundall and let in the re-asserted claim of plaintiff as a superior right and equity against said Flahive.

VIII.

That the right, title and priority of this plaintiff and said defendant, Annie Flahive, depend entirely upon the construction and interpretation of the United States Statutes aforesaid; that by reason of the mistake and error of the officers of said Land Department in the construction and interpretation thereof and applying the same to the facts so found as aforesaid, said land in controversy, and especially the sixty acres thereof so enclosed and occupied by this plaintiff as aforesaid, and to which he was and is in equity and good conscience entitled, and which should have been adjudged and awarded to him, was taken from said plaintiff and wrongfully and erroneously adjudged and awarded to said defendant, Annie Flahive, and said patent so wrongfully and erroneously issued, to her as aforesaid on account whereof she has and holds the legal title to said land in trust for this plaintiff as hereinbefore stated; that plaintiff is not advised or informed as to the necessary and proper amount of cost incurred in obtaining said patent and which ought or should be chargeable to this plaintiff, and that he is willing and tenders the same into Court upon such amount being ascertained; that no action of ejectment or other action has been commenced against this plaintiff to recover possession of said premises on account of said patent or otherwise, nothwithstanding his actual
8 possession as aforesaid since 1882; that immediately after the issuance of said patent the plaintiff corresponded with his attorneys at Washington City, D. C., who had charge of said proceedings in his behalf in the said land office, as to the propriety of commencing this action, and that soon thereafter he retained his present attorneys to commence the same; that no material or substantial change had occurred in respect to said premises, and that he has diligently prosecuted his said claim and equities, and verily believes he is entitled to the relief hereinaftr demanded; and the said plaintiff claims and asserts his title and right under the United States Statutes aforesaid.

IX.

And plaintiff also further alleges and shows unto this Hon. Court: That on the 22nd day of January, 1900, the said defendant, Annie Flahive, made and executed a mortgage to the said defendant, Andrew J. Lansing, for the sum of seven hundred dollars, upon the Southeast quarter of Section Twenty-two, Township Twenty North,

of Range Twenty-six West, which said mortgage includes the eighty acres in controversy; that the said eighty acres outside of the land in controversy and included in said mortgage, is more than sufficient to pay off the balance, if any, due upon the same; that said mortgage, as plaintiff is informed and believes, and therefore alleges, was taken with full notice of the claim and equities of plaintiff, and includes the sixty acres so possessed and fenced by him, as in his said complaint set forth, and that all said mortgage with the exception of a small amount to-wit, about the sum of two hundred dollars, has been paid by the said defendant, Annie Flahive, and that the exact amount remaining due upon the same, if anything, is unknown to this plaintiff.

Wherefore, Plaintiff prays that the said defendant, Annie
9 Flahive, be adjudged and decreed to hold the legal title to said premises obtained by said patent as the trustee of this plaintiff, and that she be compelled and required to execute a good and sufficient deed of conveyance of said title to this plaintiff, and that in the event she fails so to do, that some suitable person be appointed by this Hon. Court to make and execute the same within such time as shall be deemed reasonable.

That the amount of the indebtedness to the said defendant, Andrew J. Lansing, be ascertained and determined, and that by a decree of this court that portion of the land not in controversy be first sold to satisfy the same, or that this plaintiff be permitted to take up the said mortgage; and that plaintiff have such other or further relief as to this Hon. Court may seem just and equitable, and that he recover his costs and disbursements in this behalf expended.

TOOLE & BACH,
Attorneys for Plaintiff.

STATE OF MONTANA, *County of Lewis and Clarke, ss:*

Edwin Warren Toole, being duly sworn, deposes and says: that he is one of the attorneys for the Plaintiff in the above entitled cause; that said plaintiff is absent from the State of Montana and County of Lewis and Clarke, wherein affiant and each of plaintiff's attorneys reside, and for which reason affiant makes this verification; that affiant has read the foregoing complaint, and knows the contents thereof; and that the matters therein stated are true to the best of his knowledge, information and belief.

EDWIN WARREN TOOLE.

Subscribed and sworn to before me this Thirtieth day of November, A. D. 1900.

HARRY HARRIS,
Notary Public in and for Lewis and Clarke County, State of Montana.
[SEAL.]

10 EXHIBIT A.

Findings of Fact of the Commissioner of July 26, 1892, and Affirmed on Appeal by the Secretary of the Interior on February 12, 1894.

With regard to the contest between Edward Love and Michael Flahive, involving the E. ½ of S. E. ¼ of Sec. 22, Town 20 N. R. 26 W., the testimony shows that Love settled and built a house on the N. E. ¼ of N. E. ¼ of Section 27, same township and range, in May, 1882; he claimed one mile in length and one fourth of a mile in width. He fenced the tract in Section 27, and the South forty and one half of the north forty in E. ½ of S. E. ¼ of Section 22; Flahive worked for him and built the fence. Love did not fence the remainder of the north forty for the reason that he was not able to at that time. Flahive did not claim any portion of the land. In 1886 Love attempted to enclose the residue of the north forty, but was prevented by demonstrations of violence by Flahive who had built a house on the N. W. ¼ of S. E. ¼ of said Section 22 in October, 1884, and claimed the whole of said S. E. ¼ by virtue of a purchase from one Jim Reynolds, who, he alleged, had purchased from Edward Love.

This alleged purchase is unsupported by any other testimony, and is denied by Love. The fact of an alleged sale by Love to Rundells is an acknowledgement of Love's claim.

It would appear that at the time he initiated his claim in May, 1882, he was entitled to 160 acres as against the government; that he went to work at once and built him a house, and enclosed the whole of the land claimed by him so far as he was able to at that time, with the exception of N. ½ of the north forty; that Flahive himself worked for Love upon the fence that enclosed the land mentioned without making any claim whatever for any portion of it.

After survey in 1886 when Love attempted to complete his fencing for the north half of the north forty Flahive made threats of violence against him, he, Flahive, having in 1885, cultivated
11 one or two acres of the land on the said forty outside of Love's enclosure.

The fact that Love's house was not situated in any portion of the land in controversy is of no moment, for in making his claim as evidenced by his fencing Love intended to include the four forties north and south, that is an aggregate body belonging together, and are not to be separated and Love's house being built upon any one forty is considered as constructed upon and belonging with the whole of the land to the extent of 160 acres.

It is evident from the testimony that Flahive has no right whatever to any portion of the E. ½ of S. E. ¼ of Section 22, T. 20 N. R. 26 W., as against the claim of Love; his application to make homestead entry is accordingly rejected to the extent of the said tract subject to appeal within sixty days.

This decision was affirmed on appeal by the Secretary of the

Interior on February 12, 1894, the Secretary declaring specifically that he found no error therein.

EXHIBIT B.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 15, 1897.

LOVE
vs.
FLAHIVE.

Motion for Review.

The Commissioner of the General Land Office.

SIR: This case involves the E. ½ of the S. E. ¼ of Section 22 T. 20 N. R. 26 W., Missoula, formerly the Helena land district, Montana, and is before the department upon motion for review of departmental decision of December 26, 1896, by Edward H. Love; said decision having awarded the tract to Annie Flahive, widow of Michael Flahive.

The motion for review is upon the ground that the decision made by the department erred in holding that the application of
12 Love and Flahive were simultaneously made, to-wit, June 14, 1889, and not holding that the application of Love was made on April 5, 1889.

Upon this point the decision under review says:

Before coming to a discussion of the evidence it is well to consider a contention of counsel for the plaintiff upon another phase of the case. It appears that on January 2, 1889, Love executed the necessary papers to enter the land he seeks as a homestead.

January 16, 1889, Flahive executed his papers to enter the S. E. ¼ of Sec. 22. It does not appear when Love's application was received by the local officers, nor is there any notation of filing upon the application of Flahive.

This land became subject to entry on the 11th day of December, 1888, and it is asserted by counsel that on April 5, 1889, Love's application was rejected, showing that it must have been filed prior to that time. However this may be, the local officers declare the two applications simultaneous, and fixed the 14th day of June as the day of filing. Considering that no notation appears of the actual date of filing the fact that the local officers held them to be simultaneously, the absence of protest upon the part of the plaintiff to such holding by the local officers, until the present time, and the further consideration that this hearing was ordered for the sole purpose of determining the issue set forth in departmental decision of January 30, 1895, the protest now entered by counsel for Love will not be entertained.

In support of the assertion made by counsel for the petitioner it is

said that the application of Love has the following endorsements upon it:

Received April 5, 1889, and rejected as to the E. ½ of the N. E. ¼ of Sec. 27, T. 20 N. R. 26 W., because the same is within the forty mile limits of the grant to the Northern Pacific Rail-
13 road Company, the withdrawal for the benefit of which took effect February 21, 1872; notice given (name illegible), attorney, personally, and thirty days allowed for appeal.

(Signed) S. W. LANGHORN, *Register.*

And counsel further asserts that by letter "H" of February 18, 1892, your office directed the local officers at Missoula to "forward the application of the parties filed June 14, 1889; also the application of the plaintiff, filed April 5, 1889, to enter, in part, the tract below described" (describing the land in question); and that on April 9, 1892, the said local officers replied stating that "the docket gives date of filing as noted in the copy of the Honorable Commissioner's Letter."

It is therefore urged that the record not only shows that the application of Edward H. Love was made on April 5, 1889, but that, though there was no notation upon the application of Flahive, from the last letter *(supra)* of the local officers, it appears that such application was in fact made on June 14, 1889.

It has not been deemed necessary to verify these contentions of counsel. Assuming them to be true, and that the application of Love was in fact made April 5, 1889, and that the application of Flahive was made subsequently thereto, to-wit, on June 14, 1889, there does not appear to be any sufficient reason for disturbing the decision hereinbefore made in this cause. That decision was made upon the ground that the sale by Love to Rundall therein referred to, operated as an estoppel to the assertion of claim by Love to the tract upon which were situated the Finley logs.

And that being true, the fact that his application was made prior to that of Flahive could not inure to his advantage. If he were estopped from asserting rights under the application simultaneously made with that of Flahive, he was unquestionable estopped from asserting rights under an application made two months previous.

The motion for review is denied, and the former decision
14 of the Department is adhered to.

Herewith are returned the papers in the case.

Very respectfully, C. N. BLISS, *Secretary.*

EXHIBIT C.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *December* 26, 1896.

LOVE
vs.
FLAHIVE.

The Commissioner of the General Land Office.

SIR: This case involves the E. ½ of the S. E. ¼ of Section 22, T. 20 N. R. 26 W., Missoula, formerly Helena, Montana, land district.

The record shows that in the decision of the local officers of August 28, 1890, in the Helena Land District, it was held that the Homestead application of Edward H. Love and Michael Flahive were simultaneous, to-wit, on June 14, 1889.

The application of Love was for the E. ½ of the N. E. ¼ of Sec. 27, and the E. ½ of the S. E. ¼ of Section 22. That of Flahive was for the S. E. ¼ of Sec. 22. The two applications therefore conflicted as to the eighty acre tract in controversy.

A hearing was ordered August 14, 1889, and on August 28, 1890, an opinion was rendered recommending that Love be allowed to enter the land in controversy. Upon appeal your office decision of July 26, 1892, affirmed the action of the local officers, and on January 12, 1894, that action was affirmed by the Department (281 L. & R. 74). Subsequently, on January 30, 1895, this Department considered a motion for rehearing of said departmental decision, filed by Annie Flahive, widow; it being alleged that Love had parted with any title or interest in and to the land in controversy by a sale of the said premises to one Rundall, who has in turn sold to Flahive; and Secretary Smith said:

There can be no question that the sale herein spoken of conveyed no title. Love had no title to convey to Rundall, and Rundalls had none to convey to the defendant, but the evidence herein set forth, if true, would show that if Love had a *bona fide* settlement upon his tract of land, he had renounced all claim to it by his sale to Rundalls.

I am convinced that justice can be best subserved by remanding this case to the local officers for the purpose of a hearing of the question thus raised, and at this hearing the local officers will confine the testimony to the evidence introduced and that in contravention of the alleged sale of Love to Rundalls.

March 29, 1895, this second hearing was had, and on June 4, 1895, the local officers rendered their decision recommending that the original decision of the Department be adhered to and the land awarded to Love. Upon appeal your office decision of December 9, 1895, affirming the findings of the local officers. A motion for review of that decision having been made on March 20, 1896, a decision was rendered vacating the former judgment, reversing the action

of the local officers, and holding that the application of Love should be held subject to the rights of Flahive. Appeal by Love brings this cause to the Department.

Owing to the confused nature of the evidence and the different decisions heretofore rendered in the case at bar, it is deemed not inappropriate to give a short synopsis of the testimony.

The witness THOMAS:

In the year 1885 he spoke to Love about purchasing the Rundall claim, and that Love told him there was no necessity of buying Rundall's claim, as there was land north of his (Love's) house which could be taken. This land was in Section 22. It was the land in contest. Flahive was then living upon the Southwest quarter of what proved to be the N. E. ¼ of Sec. 22; the same place that he is living now. That the witness spoke to Rundall about buying his claim; that Rundall asked $500. Witness told him (Rundall) that he (the witness) could take land and showed him where it was; that Rundall said "That land is not vacant; I bought that land and let Flahive have it to get him out of the house," (Meaning a house on the Rundall claim). He said that he had bought it from Love. Witness subsequently bought out Rundall. In 1883 there were some logs there that belonged to Finley; the logs were on the southwest side of the northeast forty—that is, the north forty of the land in dispute. Witness was present at a conversation that occurred between Flahive and Love in 1886. Love was repairing a fence; they were quarreling and Flahive wanted Rundall to tell Love that he (Rundall) had bought the place of him (Love). Rundall did so, and told him that he had paid him $20 for it. Love answered, "He told him he had sold out and left there and it was none of his fight." Rundall, Flahive, Love, Ross and witness were present. The fence was on the north forty of the land in dispute.

Cross-examination:

There were some improvements there in 1885 that belonged to Love. The improvements were fencing.

The witness HURLBURT:

There was an unfinished cabin upon the land in dispute in 1883.

ADEN C. VANDERPOOL:

He, with Ross and Lynch, went to see Love at his house; Love said he had a claim for sale that belonged to a friend; it was the land in dispute. He offered it for $70. The land was not surveyed. He did not buy. Subsequently, "Love told me that Rundall was going to jump this claim, and fearing that he would jump it he accepted twenty dollars."

Cross-examination:

This conversation about buying the land was in August, 1883. Love was not occupying this land. Love's friend had some logs on

the land. Did not hear Love say that he had some logs to sell. The logs were on the claim and the claim was for sale.

17 NEPTUNE LYNCH, SR.:

Was present at the conversation between Vanderpool and Love in 1883. Vanderpool, Love, Ross and witness were present. Love said he had two claims, one was for sale and belonged to Finley. He asked $75. Vanderpool did not purchase. Subsequently Love showed him a twenty dollar gold piece and said Rundall had paid him that for the land. Rundall and Flahive were in partnership; they dissolved, and he, at Flahive's request, drew up a bill of sale from Rundall to him for this tract of land, which Rundall had purchased from Love.

Cross-examination:

Love had improvements on both tracts. On the land he was trying to sell there was a partly built cabin.

JAMES RUNDALL:

In the fall of 1883 "I bought a piece of land of him (Love) that he claimed as the Finley claim, lying north of the one he resides on now; I paid him 20 dollars for the piece of land; this claim I bought adjoins the one he lives on at present; he claimed the one he lives on at present was railroad land; and the Finley claim would be government land; the land was not surveyed." There was a log cabin five or six logs high upon the tract in controversy. Rundell and Flahive were partners, and the next fall they dissolved partnership and Flahive went to live where his family is now residing. The land in dispute was included in the purchase from Love. Witness was present at the conversation between Love and Flahive. Flahive forbade his working on the land. Witness told Love that the land had been sold to him. "I think he said it was none of my business or none of my fight."

Cross-examination:

Love sold Finley's claim; paid him $20 for the land and the logs. The land was not claimed by Love. The house built by witness after survey proved to be upon another quarter section, though he had intended to build upon the land that he had purchased from
18 Love. It was only forty rods from his house to the line.

On Behalf of Love.

HUGH MONNAHAN:

Love claimed the land in dispute in 1883. Rundall bought some logs of Love and moved them to Maher's place. Part of the land in dispute was enclosed by Love. The logs were upon the land now owned by Thomas, up the southeast quarter of the latter's claim. Rundall built on the N. E. ¼ of Sec. 22; that is the Thomas claim now.

JAMES S. MERRITT:

Love settled upon this land in 1882. Witness saw the logs; they were situated, to the best of his recollection, not on the land in dispute. "I think near where Mrs. Flahive's house is; on the west half of the S. E. ¼ of Sec. 22." Rundall's house was near the center of the N. E. ¼ of Sec. 22. From the way that Love fenced it looked as if he claimed a quarter of a mile wide and a mile long.

Witness COMBEST:

Testified to nothing pertaining to the case.

The witness GIBBS:

Was present at the conversation between Love and Flahive. Does not recollect that Rundall took any part in the conversation.

EDWARD H. LOVE:

Did not sell any land to Rundall. "On the 11th of September, 1883, I was building a house for a man by the name of Maher, and there was some logs on a claim there which belonged to one W. H. Finley; Mr. Rundall told me (he) had a notion of taking that claim; he had seen no one on it, as he claimed he was watching it close; he asked me who owned those logs; I told him it was W. H. Finley. He asked me where he was; I told him he was keeping a saloon at Heron Siding, and he could write to him about those logs.

He asked me if I wouldn't write to him, as I was acquainted
19 with Finley, to know what he would take for the logs. I told him I would do so, and the reply came from Mr. Finley to tell this man that he would take $70 for the logs. He told me he could go to grass with his logs, and (he) would take the claim anyway as it was vacant. He said he would give $20 for the logs and said he would give me the money. If not he would go on the claim anyway. The next day he put the logs on his wagon and hauled them down to Mr. Maher's house and put them in a cellar that he was digging for that man at that time. That is the whole history of the logs. Those logs were on what is now called the Bud Thomas Claim." Nothing was said about witness claiming the land for himself or for Finley. Did not claim the land upon which the logs were situated.

(A diary was offered in evidence by the witness.)

Had the land marked with stakes in 1882; these stakes were set a mile apart in length and a quarter of a mile in width.

LYNCH (in rebuttal):

Finley cabin was on the N. E. ¼ of the S. E. ¼ of Sec. 22, on the north forty of the land in dispute; between a quarter and a half a mile from Love's.

The exhibit "B" which was a diary of Love's and is introduced for the purpose of showing that the transaction had a reference to logs and not to the land; the entries referred to being found on pages

58 and 59. On page 58, under date of Tuesday, September 11th, the following entry is made: "Wrote to W. H. Finley about his logs for J. Rundall." Under date of September 14th, on page 59, the following appears: "James Rundall paid me $20 for W. H. Finley's logs. Debtor to W. H. Finley for $20 from James Rundall."

* * * * * * *

Before coming to a discussion of the evidence it is well to consider a contention of counsel for the plaintiff upon another phase of the case. It appears that on January 2, 1889, Love executed the necessary papers to enter the land he seeks as a homestead.
20 January 16, 1889, Flahive executed his papers to enter the S. E. ¼ of Sec. 22. It does not appear when Love's application was received by the local officers, nor is there any notation of filing upon the application of Flahive.

This land became subject to entry on the 11th day of December, 1888, and it is asserted by counsel that on April 5, 1889, Love's application was rejected; showing that it must have been filed prior to that time. However this may be, the local officers declare the two applications simultaneous, and fixed the 14th day of June as the date of filing. Considering that no notation appears of the actual date of the filing, the fact that the local officers held them to be simultaneous, the absence of protest upon the part of the plaintiff to such holding by the local officers, until the present time, and the further consideration that this hearing was ordered for the sole purpose of determining the issue set forth in departmental decision of January 30, 1895, the protest now entered by counsel for Love will not be entertained.

Much of the testimony, as shown by the synopsis, is incompetent and irrelevant, and great difficulty has been met with in determining the question presented by the record.

The witnesses Vanderpool and Lynch testify that Love had a place for sale which included the tract in controversy; Rundall that he purchased the tract in controversy from Love. The latter denies any sale of the land, but states that he sold some logs for W. H. Finley. It is evident from Love's statement of the transaction that, conceding the sale to be only of logs, he was aware that the land upon which the logs were situated would be claimed by the purchaser of the logs, not by virtue of the sale of the logs, but because it appears that he sold the logs for the reason that the claim of W. F. Finley, upon which the logs were situated, was about to be taken by Rundall. So the inquiry can be narrowed down to the position of these logs. On Flahive's part, Thomas, Vander-
21 pool, Lynch, Rundall, C. Lynch and Hurlbut state that these logs were on the land in dispute. Monnahan, for Love, locates them north of the land in dispute and upon the Thomas claim; Merritt, for the same party, says they were on the S. E. ¼ of Sec. 22, but near Mrs. Flahive's house; which would place them on the land included in Flahive's application, but outside of the limits of the land in contest; and Love testifies that they were upon the Thomas claim. So it appears that a clear preponderance

of the testimony shows that the logs were situated upon the land in controversy; and from Love's evidence it is shown that he at the time of this sale laid no claim to the land upon which this unfinished cabin was erected.

Further, Thomas and Rundall state that in the controversy between Flahive and Love over the repairing of a fence, Rundall told Love that he had bought this land from him and that Love replied that it "was not his fight." This was the assertion of the sale in the presence of the vendor, and there was no denial.

Vanderpool and Lynch testify that Love had some land for sale, and not logs, and that the land for sale was the land in controversy.

Love introduced his diary to substantiate his testimony that the transaction between himself and Rundall had reference solely to the logs; but an inspection of the entries upon which he relies, as found upon pages 58 and 59, shows them to be interlineations, and apparently, from an examination of the diary, an attempt to manufacture evidence to corroborate his testimony.

It thus appears that from a preponderance of the testimony it is shown that this tract of land was not claimed by Love at the date of the sale of this land or of these logs; for it is evident that in either case Love asserted no title. It matters not, under the peculiar circumstances of this case, whether Love sold his own land or the land of W. H. Finley or simply logs; as in
22 the first instance it would work an estoppel of the assertion of claim now, in the second it would be conclusive evidence that the land was not claimed by him, and in the third it would be equally evidence of the same fact, as from his own testimony it appears that he laid no claim to the land upon which the logs were situated.

This decision is not to be understood as holding that Love, in selling the Finley claim to Rundall, conveyed to the latter any title, or that Rundall, in selling to Flahive, did so; but it appearing that this sale was made, it is conclusive evidence that Love asserted, at that time, no title in himself, or if he had prior to such time asserted title, that by such sale he relinquished all claim in and to the tract in controversy; and that he is in equity and good faith, estopped from asserting title against the vendee of the purchaser from him.

The decision appealed from is therefore affirmed and the application of Love to enter the tract in controversy is held subject to the rights of Annie Flahive, the widow of Michael Flahive.

Herewith are returned the papers in the case.

Very respectfully, DAVID R. FRANCIS,
Secretary.

Filed Dec. 3, 1900.
JOHN L. SLOANE, *Clk,*
By THOS. E. EVANS, *Dep. Clerk.*

(Title of Court and Cause.)

Now comes the above-named defendants and demur to the complaint of plaintiff filed herein and as ground for demurrer, allege:—
That said complaint does not state facts sufficient to constitute a cause of action against defendants or either of them.

E. E. HERSHEY,
Attorney for Defendants.

Filed Dec. 22, 1900.
JOHN L. SLOANE, *Clerk,*
By R. W. KEMP, *Deputy.*

23 District Court Journal, Sixteenth Day, March Term, 1903, July 6th, 1903.

EDWARD H. LOVE
vs.
ANNIE FLAHIVE and ANDREW J. LANSING.

The demurrer to the Complaint taken under advisement Feb'y 8th 1902 is sustained and an exception is entered for the plaintiff.

(Title of Court and Cause.)

The Court on the 6th day of July, 1903, having by an order made on that day sustained the defendant's demurrer to the plaintiffs complaint in said action and no time being asked or granted, and more than five days having elapsed since said demurrer was sustained and no amended complaint having been filed therein; Now on motion of the defendants' attorneys, the default of the plaintiff for not filing an amended complaint in said action is hereby entered.

Attest, my hand, and the seal of said Court, this 15th day of September, 1903.

[SEAL.]

R. W. KEMP, *Clerk,*
By THOS. E. KEMP,
Deputy Clerk.

District Court Journal, Second Day, December Term, 1904. Dec. 6th, 1904.

(Title of Cause.)

Whereas, the court has heretofore on the 28th day of November, 1903, made an order directing judgment to be entered in favor of the defendants in this action upon the demurrer interposed by them, upon the payment of the legal fees therefor, and whereas said fees were paid on the 30th day of November, 1903, by Toole and Bach, attorneys for plaintiff.

Now, Thereupon, on the motion of Ira T. Wight, Esq., who appeared on behalf of Toole & Bach, attorneys for plaintiff.

24 It is ordered, adjudged and decreed that the said defendants have and recover judgment against the said plaintiff for costs of suit, and that plaintiff's said bill be, and the same is, hereby dismissed.

FREDERICK C. WEBSTER, *Judge.*

(Title of Court and Cause.)

Certificate to Judgment Roll.

I, the undersigned, Clerk of the District Court of the Fourth Judicial District of said State of Montana, in and for the County of Missoula, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled action, and recorded in Judgment Book H. of said court at page 555. And I further certify, that the foregoing papers hereunto annexed, constitute the judgment roll in said action.

Witness my hand, and the seal of said District Court this 6th day of December, 1904.

[SEAL.]

R. W. KEMP, *Clerk,*
By THOS. E. KEMP,
Deputy Clerk.

(Title of Court and Cause.)

Notice of Appeal.

To the clerk of the said District Court, and to the above named defendants, and to Messrs. E. E. Hershey and Woody & Woody, their attorneys:

Please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of this State from the judgment therein made and entered in the said District Court on the 6th day of December, 1904, in favor of the defendant in said action and against the plaintiff, and from the whole thereof.

Dated February 18th, 1905.

TOOLE & BACH,
Attorneys for Plaintiff.

Filed February 21st, 1905.

R. W. KEMP, *Clerk,*
By THOS. E. KEMP, *Deputy.*

25 (Title of Court and Cause.)

Proof of Service.

Due and timely service of notice of appeal in the above entitled cause and receipt of a true copy thereof are hereby admitted and acknowledged this 21st day of February, 1905.

ELMER E. HERSHEY AND
WOODY & WOODY,
Attorneys for Defendants.

Office of the Clerk of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, *ss:*

I, R. W. Kemp, Clerk of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, do hereby certify that the foregoing is a full, true and correct copy of the Judgment Roll, Notice of Appeal and Proof of Service of Appeal, of the above entitled action and that an undertaking on appeal in said cause in due form has been properly filed in my office.

R. W. KEMP,
Clerk of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula.
[SEAL.]

Transcript filed in the Supreme Court of the State of Montana April 14, 1905.

26 *Order for Judgment.*

Minutes of Supreme Court, State of Montana.

Seventh Day of December Term.

MONDAY, *December 18th*, 1905.

Court convened pursuant to adjournment.
Present: The Hon. Theo. Brantly, Chief Justice.
" " Geo. R. Milburn, Associate Justice.
" " Wm. L. Holloway, " "
John T. Athey, Clerk.
M. N. Race, Marshal.
And the following proceedings were had, to-wit:

2194.

EDWARD H. LOVE, Pl'ff and App'l't,
vs.
ANNIE FLAHIVE ET AL., D'f'ts and Resp'ts.

This cause this day came on for the judgment and decision of the Court. Whereupon on consideration, it is now here ordered and adjudged by this Court, that the judgment of the Court below made and entered on the 6th day of December, A. D. 1904, be and the same is hereby affirmed at the cost of the appellant. Opinion by Mr. Chief Justice Brantly, Mr. J. Milburn and Mr. J. Holloway concurring.

Minutes of the day's proceeding signed by

THEO. BRANTLY.
GEO. R. MILBURN.
WM. L. HOLLOWAY.

27 *Opinion of the Court.*

No. 2194.

EWARD H. LOVE, Plaintiff and Appellant,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendants and Respondents.

Mr. Chief Justice BRANTLY delivered the opinion of the Court:

This action was brought to obtain a decree declaring the defendant Annie Flahive, trustee for the benefit of the plaintiff of the legal title to the east half of the south-east quarter of section 22, township 20, north of range 26 west, in Missoula county. The defendant Lansing is made a party because he appears of record as a holder of a mortgage upon the property from his co-defendant. The debt secured by this mortgage is alleged to have been paid, except a small balance. The district court sustained a general demurrer to the complaint, and, plaintiff declining to amend, entered judgment for the defendants. Plaintiff has appealed from the judgment.

The complaint is prolix and contains much matter that is immaterial. The pertinent facts, as they appear from its allegations and the exhibits attached to and made a part of it, are substantially as follows: In May, 1882, the plaintiff, being a citizen of the United States and qualified to acquire a homestead upon the public domain under the federal homestead laws, settled upon the east half of the north-east quarter of section 27, township 20, north of range 26 west, and built a house thereon. He claimed this land and also the land in controversy immediately to the north. He fenced it all except the north twenty acres of the disputed portion. One Michael Flahive, the husband of the defendant Annie Flahive, then worked for him and built the fence. The land had not been surveyed. In October, 1884, Michael Flahive made settlement on the north-

28 west quarter of the south-east quarter of section 22. He built a house thereon, and thereafter claimed the whole of that quarter of the section as his homestead. He was also qualified to acquire a homestead under the laws of the United States. He retained possession of the west half of the quarter section and also of the unfenced portion of the east half and cultivated it.

The official survey was made in 1886, but the plat was not approved and filed in the local land office until December 11, 1888. On January 2, 1889, the plaintiff executed the papers necessary to enter the land claimed by him. On January 16 Flahive executed the papers necessary to enter the south-east quarter of section 22. It does not appear distinctly from the allegations of the complaint when the applications were tendered to the officers of the local land office. However the fact may have been, in the subsequent controversy between the parties as to which of them was entitled to enter the land in dispute, these officers found and declared that the entries were tendered simultaneously, and by a decision made August 20, 1890,

fixed the date as June 14, 1889, and, inasmuch as the plaintiff appeared to have been the first settler, recognized his claim, permitted him to make the entry, and rejected Flahive's application as to the disputed portion. This decision was upon successive appeals to the commissioner of the general land office and the secretary of the interior, affirmed, the decision of the secretary of the interior being rendered on January 12, 1894.

In the meantime Flahive died. The defendant Annie Flahive, his widow, thereupon filed a motion for a rehearing, the ground alleged being that subsequent to his settlement in 1882, the plaintiff had, by a sale, parted with his interest in the portion of section 22 in controversy to one Rundall, who in turn had sold to Flahive, with the result that the plaintiff's right to entry was subject to that of
29 her husband Flahive. The rehearing was granted and the matter referred to the local officers for proof. Again the decision of these officers was in plaintiff's favor. Upon final appeal to the secretary of the interior this decision was reversed and the rights of the defendant Flahive held superior to those of the plaintiff. This decision was rendered on December 26, 1896. A motion for rehearing by the plaintiff, on the ground that the records of the local land office showed that his aplication for entry was in fact made prior to that of Flahive, and as early as April 5, 1889, was denied on March 15, 1897. Thereupon Flahive's entry was allowed and patent issued to Annie Flahive.

In making the decision of December 26, 1896, the secretary of the interior had before him evidence from which he found that subsequent to the date of plaintiff's entry in 1882, he had sold his interest, whatever it was, in the land in dispute to one Rundall, who in turn sold it to Flahive, and held that, such being the case and the two entries having been tendered simultaneously, the Flahive application should be given preference.

By the motion for rehearing by plaintiff, there was submitted the question whether, upon the records, the application for entry by the plaintiff had not in fact been made prior to June 14, 1889, and as early as April 5, 1889. It does not appear from the allegations of the complaint that such was the case; nor that the finding by the officers of the local land office that the entries were tendered simultaneously was erroneous. The decision of the secretary of the interior held in effect, that, since the entries were tendered simultaneously, it was of no consequence whether June 14 or April 5 was the correct date, that the result of the sale by the plaintiff was the same in either event, and that it operated as an estoppel against plaintiff's claims to preference.

30 The contention is made that the officers of the land department erred in holding that the fact that plaintiff's application for entry was tendered *bo* the officers of the local land office as early as April 5, 1889, was immaterial, since, if the application was in fact made at that time, he, being the first settler, had the preference. The further contention is made that if the applications were tendered simultaneously on June 14, 1889, the plaintiff was entitled to the preference, because, Flahive having failed to avail himself

of his preferential right during the three months following the approval of the survey and the receipt of the plat at the local land office (U. S. Rev. Stat., 2266; 21 Statutes at Large, p. 140, secs. 2 & 3), the right of plaintiff under his prior settlement became again superior, even if it be conceded he had lost it in the first instance by sale to Rundall subsequent to such settlement. In other words, let it be conceded that the sale operated as an estoppel to his assertion of a claim to preferential entry until the expiration of the time during which Flahive had the exclusive right,—that is until the expiration of the three months after the receipt of the plat at the local land office,—the plaintiff's old right revived and he should have been given preference, though the applications for entry were tendered simultaneously. It is said that in deciding both matters there was error in the application of the law to the facts, and plaintiff invokes the rule that whenever the officers of the land department of the United States have misconstrued the law involving the rights of entrymen, or have made a misapplication of it to the facts of the particular case, with the result that a patent has been issued to the wrong person, and thus an injustice is done to another who is of right entitled to it, a court of equity will hold the former a trustee for the latter and decree title accordingly. This rule is well settled.
31 (Small *v.* Rakestraw, 28 Mont. 413; Johnson *v.* Tousley, 13 Wall. 72.) But we think it has no application to this case.

In holding that it was not material whether the plaintiff's application to make entry was in fact tendered on April 5 or June 14, 1889, the secretary's decision was clearly right. By the decision of August 20, 1890, it was found by the local officers that the entries were tendered simultaneously. So far as the record shows, this finding was never questioned. Nor was the date of filing ever questioned until, by the motion for a rehearing, decided by the secretary on March 15, 1899, the secretary held that even if the local officers were mistaken in fixing June 14 as the date, the fact of simultaneous application still remained unquestioned, and that the difference in the date did not avail. If it be assumed that the finding of the local officers was erroneous as not being in accordance with the preponderance of the evidence, or that the decision of the secretary was wrong for the same reason, yet what the evidence before them was does not appear; and if it did, this court could not assume to review it and reach a different conclusion; for, in the absence of fraud, the findings of the officers of the land department upon all questions of fact are conclusive upon the courts. (Small *v.* Rakestraw, *supra,* and cases cited.)

Again. It is manifest that if the plaintiff after his settlement had sold his interest to Flahive, the latter had the exclusive right of entry until March 11, 1889. As between the two applications tendered before that date, Flahive was entitled to preference. If plaintiff's right had been sold or abandoned by him, it must follow that his settlement in 1882 could not be recognized as initiating any right of preference over Flahive, who had preserved his from the date of settlement in 1884. After the expiration of the three months from

December 11, 1888, the parties stood upon equal footing, and the one first tendering his application was entitled to preference. Since they were tendered simultaneously and both parties founded
32 their claim of right upon their first settlement, the secretary of the interior concluded that the Flahive right, which had been preserved intact, should be given preference over one which had been relinquished or abandond, nothing appearing to show that the latter had ever been reestablished prior to the date of Flahive's settlement. After a claim has once been abandoned, the right to it may be acquired by any other person who desires to take it.

Counsel for appellant have devoted much of their argument to the contention that the secretary in his decision of December 26, 1896, holding that the plaintiff was estopped by his sale to Rundall to claim a preference right, undertook to adjudicate the equities between the parties, whereas all these matters should have been left to be determined by a court of equity having cognizance of such matters. It is of no consequence whether the result of the sale be called an estoppel or an abandonment. The fact that there was a sale made was material in an investigation of the question then before the secretary and entirely within his jurisdiction to decide, to-wit: who made the prior settlement and was therefore entitled to entry. This being a question of fact, it was within the jurisdiction of the department to decide it, and in the absence of fraud, its finding must be deemed conclusive. (Small *v.* Rakestraw, *supra*, and cases cited.)

The judgment of the district court was correct and must be affirmed.

Affirmed.

THEO. BRANTLY,
Chief Justice.

We concur:

GEO. R. MILBURN,
Associate Justice.

WM. L. HOLLOWAY,
Associate Justice.

Opinion filed December 18th, 1905. Rehearing denied January 20, 1906.

33 In the Supreme Court of the State of Montana.

EDWARD H. LOVE, Plaintiff and Appellant and Plaintiff in Error,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendants and Respondents and Defendants in Error.

Petition for Writ of Error.

To the Honorable Theodore Brantly, Chief Justice of the Supreme Court of the State of Montana:

Comes now Edward H. Love, plaintiff in error in above entitled cause, and feeling himself aggrieved by the decision of the Supreme

Court of the State of Montana rendered in the above entitled cause on the 18th day of December, 1905, and in which a motion for rehearing was denied on the 20th day of January, 1906, by Charles Edmund Pew, his attorney, respectfully represents to your Honor:

1. That this petitioner, as appears by the pleadings and the record, claims to be the owner of the lands in controversy in said above entitled cause, under the provisions of Chapter IV and Chapter V of Title 32 of the Revised Statutes of the United States of 1878, and amendments thereof;

2. That this action is not a personal action, but involves the title to specific real property, claimed by this plaintiff in error as above set forth;

3. That there was drawn in question in said above entitled action the construction of the United States Statutes contained in said Chapters IV and V of Title 32 aforesaid, and particularly Sections 2257, 2259, 2264, 2265 and 2266 of said Revised Statutes.

34 4. That under the provisions of said Chapter IV and Chapter V of said Title 32 aforesaid, said defendants in error are not entitled to said lands involved in this action, nor any part thereof, nor are either of said defendants entitled to any part of said lands.

5. That the decision of the said Supreme Court of the State of Montana in said above entitled cause was against the right and title so as aforesaid set up and claimed by this plaintiff in error, and that said decision was so rendered and the said Supreme Court of the State of Montana so decided against the right and title so set up and claimed by this plaintiff in error as aforesaid, because of the construction placed upon said statutes by the said Court; and that by reason of said construction so placed upon said statutes by said Supreme Court of the State of Montana, said land was by said Court decreed to belong to said defendants in error, and that your petitioner had no right or title thereto;

6. That the said Supreme Court of the State of Montana was then and there and still is the highest Court of law and of equity, and the highest court of law or of equity of the said State of Montana, in which a decision could be had in said above entitled suit.

7. And your petitioner further respectfully represents that in the records and proceedings, and also in the rendition of the said judgment in the above entitled cause, which is in the Supreme Court of the State of Montana, before you, a manifest error hath happened in the matters and things in your petitioner's assignment of error herein more specifically set forth, to the great injury and damage of your petitioner.

Wherefore your petitioner prays that it may please your Honor to grant unto your petitioner a writ of error to remove the

35 said cause and the record thereof into the Supreme Court of the United States, to the end that the error, if any hath happened, may be duly corrected and full and speedy justice done your petitioner; and that an order be issued to the District Court of Missoula County, Montana, staying all proceedings in said above

entitled cause until a hearing and decision is had in the said Supreme Court of the United States.

And your petitioner will ever pray.

CHARLES EDMUND PEW,
Attorney for Plaintiff in Error.

Writ of error allowed upon the execution of a bond by Edward H. Love, plaintiff in error, in the sum of $500.00. Said bond to be executed by two sufficient sureties, and when approved, to act as a supersedeas.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Dated January 23, 1906.
Petition filed January 23rd, 1906.

In the Supreme Court of the United States.

EDWARD H. LOVE, Plaintiff and Appellant and Plaintiff in Error,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendants and Respondents and Defendants in Error.

36 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Montana before you or some of you, being the highest Court of Law or Equity of the said State, in which a decision could be had in the said suit between Edward H. Love and Annie Flahive and Andrew J. Lansing, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution of or a treaty or statute of, or commission held under the United States, and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Edward H. Love, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 31st day of March, next, in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid being inspected, the
37 said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of January, 1906.

GEO. W. SPROULE,
[SEAL.] *Clerk of the Circuit Court of the United States, District of Montana.*

Allowed by:
THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Due service of the above writ of error this 31st day of January, 1906, and receipt of two copies left with me at the same time, is hereby admitted.

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

Due service of the foregoing writ of error and receipt of two copies thereof are hereby admitted this 3rd day of February, A. D. 1906.

WOODY & WOODY AND
E. E. HERSHEY,
Attorneys for Defendants in Error.

Writ filed in the Supreme Court of the State of Montana on the 31st day of January, A. D. 1906.

38 In the Supreme Court of the State of Montana.

EDWARD H. LOVE, Plaintiff & Appellant and Plaintiff in Error,
vs.
ANNIE FLAHIVE & ANDREW J. LANSING, Defendant- & Respondents and Defendants in Error.

Bond on Appeal.

Know all men by these presents: That we Edward H. Love, of the County of Missoula, State of Montana, as principal, and John Morrison and Joseph H. Boyer of the same County and State, as sureties, are held and firmly bound unto Annie Flahive and Andrew J. Lansing in the full and just sum of five hundred dollars,

to be paid to said Annie Flahive and Andrew J. Lansing, or *his* attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of January, A. D., 1906.

Whereas, lately, to-wit, on the 18th day of December, A. D., 1905, at a session of the Supreme Court of the State of Montana in a suit pending in said Court between Edward H. Love, appellants and Annie Flahive and Andrew J. Lansing, respondents, a decree was rendered by said Court against the said Edward H. Love, and the said Edward H. Love having obtained from said Court an order allowing a writ of error on appeal to the United States Supreme Court to reverse the decree so rendered by said Supreme Court of the State of Montana, as aforesaid, and a citation directed to the said Annie Flahive and Andrew J. Lansing is about to be issued
39 citing and admonishing them to be and appear at the Supreme Court of the United States;

Now therefore, the condition of the above obligation is such that if the said Edward H. Love shall prosecute his said appeal to effect and shall answer all damages and costs that may be awarded against him if he fail to make his plea good, then the obligation is to be void, otherwise to remain in full force and virtue.

(Signed) EDWARD H. LOVE. [SEAL.]
(Signed) JOHN MORRISON. [SEAL.]
(Signed) JOSEPH H. BOYER. [SEAL.]

STATE OF MONTANA, *County of Missoula, ss:*

John Morrison and Joseph H. Boyer, whose names are subscribed as sureties to the above bond, being severally duly sworn, each for himself, says: that he is worth the sum in said bond specified, as a penalty over and above all his just debts and liabilities exclusive of property exempt by law from execution.

(Signed) JOHN MORRISON.
(Signed) JOSEPH H. BOYER.

Subscribed and sworn to before me this 29 day of January, A. D. 1906.

(Signed) H. J. BURLEIGH,
Notary Public in and for the County of Missoula, State of Montana.

Approved this 31 day of January, 1906.

(Signed) THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Attest as to approval and approved by
JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

40 In the Supreme Court of the United States.

EDWARD H. LOVE, Plaintiff and Appellant and Plaintiff in Error,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendants and Respondents and Defendants in Error.

Citation.

The President of the United States to Annie Flahive and Andrew J. Lansing, Defendants in Error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, District of Columbia, within 60 days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Montana, wherein Edward H. Love is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 31 day of January, A. D. 1906, and of the Independence of the United States, the one hundred and thirtieth.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Signed and allowed by the Chief Justice this 31st day of January, A. D. 1906.

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

Due and lawful service of a copy of the foregoing citation and of the Writ of Error mentioned therein acknowledged at Missoula County this 3rd Day of February, A. D. 1906.

WOODY & WOODY AND
E. E. HERSHEY,
Attorneys for Defendants in Error.

41 In the Supreme Court of the State of Montana.

EDWARD H. LOVE, Plaintiff and Appellant and Plaintiff in Error,
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendants and Respondents and Defendants in Error.

Assignment of Error.

Comes now Edward H. Love, Plaintiff in Error herein, by Charles Edmund Pew, his attorney, and says that the record and proceed-

ings in the above entitled cause show that there is manifest error in this, to-wit:

1. That the Supreme Court of the State of Montana erred in holding that plaintiff in error was not and is not entitled to the land involved in said above entitled action, and the whole thereof, as first settler under the pre-emption and homestead laws of the United States.

2. The Supreme Court of the State of Montana erred in holding that the action of the District Court of Missoula County, Montana, sustaining the demurrer to the plaintiff's complaint in above entitled action was correct.

3. The Supreme Court of the State of Montana erred in holding that said District Court did not err in deciding that the plaintiff's complaint in said action did not state a cause of action.

4. The Supreme Court of the State of Montana erred in holding that the action of the District Court of said Missoula County in entering judgment for defendant and against plaintiff in said action, upon said complaint and the demurrer thereto was correct.

42 5. The Supreme Court of the State of Montana erred in holding that it was immaterial whether the homestead application of plaintiff was in fact filed before that of defendant Flahive was filed or not.

6. The Supreme Court of the State of Montana erred in not treating the application of plaintiff Love as having been filed April 5th, 1889, and that of Flahive as having been filed June 14th, 1889.

7. The Supreme Court of the State of Montana erred in holding that the alleged sale from Love to Rundall and from Rundall to Flahive estopped plaintiff in error from afterwards asserting title to the land in controversy, and in holding that said alleged sale operated to defeat the operation of the pre-emption and homestead laws of the United States.

8. The Supreme Court of the State of Montana, erred in holding that the land department committed no error in construing the law in allowing the estoppel alone to defeat the operation of the statute, and in holding that it operated to prevent plaintiff from making a new application after the forfeiture of Flahive.

9. The Supreme Court of the State of Montana erred in holding that the plaintiff in error ever abandoned said lands or any part thereof.

10. The Supreme Court of the State of Montana erred in holding that defendants or either of them, or their predecessors in interest, or the predecessors in interest of either of them, ever acquired any right to said land superior to those of this plaintiff in error.

11. That the Supreme Court of the State of Montana erred in holding that defendants in error or either of them ever were or now are entitled to and are the owners of said lands or any part thereof.

43 12. The Supreme Court of the State of Montana erred in holding that under simultaneous filings by Love and Flahive, that Flahive was entitled to the land in controversy or any part thereof.

13. The Supreme Court of the State of Montana erred in not hold-

ing that under simultaneous filings Love was entitled to the land, it appearing by the complaint and being admitted by the demurrer that plaintiff in error was in possession of the land at the time of and after the forfeiture of Flahive.

14. The said Court erred in holding that the Land Department committed no error in refusing upon the hearing before the Honorable Secretary of the Interior to make a finding of the relative dates of the filing of the homestead applications of Love and of Flahive.

Wherefore, said plaintiff in error prays that the said judgment of the said Supreme Court of the State of Montana be reversed and that the said Court be directed to enter an order reversing the judgment herein.

And your petitioner will ever pray.

CHARLES EDMUND PEW,
Attorney for Plaintiff in Eror.

Assignment of errors filed in the Supreme Court of the State of Montana January 23rd, A. D. 1906.

44 STATE OF MONTANA,
Office of the Clerk of the Supreme Court, ss:

I, John T. Athey, Clerk of the Supreme Court of the State of Montana, do hereby certify that the foregoing 43 pages contain a true copy of the records in the case of Edward H. Love *vs.* Annie Flahive and Andrew J. Lansing, including the transcript filed in this Court; a copy of the opinion of this Court and a copy of the judgment rendered herein by said Supreme Court; also a copy of the assignment of error filed by the plaintiff in error herein; and also a copy of the citation filed herein; all of which is hereby certified and transmitted to the Supreme Court of the United States in obedience to the writ of error filed herein, of which a true copy is also contained in the foregoing record, together with a copy of the petition for the said writ, a true copy of the order for its issue, and a true copy of the undertaking for costs, filed by the plaintiff in error, as the same, and all of the same, appear from the records of my office.

I also hereby certify that the original citation and writ of error were lodged in my office on the 31st day of January, 1906, together with two copies of each of same for defendants in error, and that the originals of said citation and writ of error are hereto attached and herewith transmitted to the said Supreme Court of the United States.

Witness my hand and the seal of the said Court this 9th day of February, A. D. 1906.

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

45 In the Supreme Court of the United States.

EDWARD H. LOVE, Plaintiff in Error,

vs.

ANNIE FLAHIVE and ANDREW J. LANSING, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Montana, before you or some of you, being the highest Court of Law or Equity of the said State, in which a decision could be had in the said suit between Edward H. Love, and said Annie Flahive and Andrew J. Lansing, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution of or a treaty or statute of, or commission held under the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Edward H. Love, plaintiff in error, as by his complaint appears.

46 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 31st day of March next, in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States the 30th day of January, A. D. 1906.

[Seal United States Circuit Court, District of Montana, 1880.]

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States, District of Montana.

Allowed by:

THEO BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Foregoing writ of error served and copy received this 3rd day of February, 1906.

WOODY & WOODY and
ELMER E. HERSHEY,
Attorneys for Defendants in Error.

Due service of the above writ of error this 31st day of January, 1906, and two copy-s left with me at the same time, is hereby admitted.

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

47 [Endorsed:] 2194. In the Supreme Court of the United States. Edward H. Love, Plaintiff in Error, *vs.* Annie Flahive and Andrew J. Lansing, *Lansing,* Defendants in Error. Writ of Error. Filed January 31, 1906. John T. Athey, Clerk. Thomas C. Bach and Charles Edmund Pew, Attorneys for Plaintiff in Error.

48 In the Supreme Court of the United States.

EDWARD H. LOVE, Plaintiff & Appellant and Plaintiff in Error,
vs.
ANNIE FLAHIVE & ANDREW J. LANSING, Defendants & Respondents and Defendants in Error.

Citation.

The President of the United States to Annie Flahive & Andrew J. Lansing, Defendants in Error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, District of Columbia, within 60 days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Montana, wherein Edward H. Love is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parities in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 31 day of January, A. D. 1906, and of the Independence of the United States, the one hundred and thirtieth.

THEO BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Signed and allowed by the Chief Justice this 31st day of January, A. D. 1906.

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

Due and lawful service of a copy of the foregoing Citation and the Writ of Error mentioned therein acknowledged at Missou County this 3rd day of February, A. D. 1906.

WOODY & WOODY,
ELMER E. HERSHEY,
Attorneys for Defendants in Error.

49 [Endorsed:] 2194. In the Supreme Court of the Unit States. Edward H. Love, Plaintiff in Error, *vs.* Annie Fl hive and Andrew J. Lansing, Defendants in Error. Citation. Fil January 31, 1906. John T. Athey, Clerk. Thomas C. Bach a Charles Edmund Pew, Attorneys for Plaintiff in Error.

50 In the Supreme Court of the State of Montana.

EDWARD H. LOVE, Plaintiff and Appellant and Plaintiff in Erro
vs.
ANNIE FLAHIVE and ANDREW J. LANSING, Defendant- and Respon ent- and Defendant- in Error.

Proof of Service.

Due service of the petition for writ of error and assignment error in the above entitled action, and receipt of 2 copies of ea thereof, admitted this 3rd day of February, 1906.

WOODY & WOODY and
ELMER E. HERSHEY,
Attorneys for Defendants in Error.

51 [Endorsed:] 2194. In the Supreme Court of the State Montana. Edward H. Love, Plaintiff in Error, *vs.* Ann Flahive and Andrew J. Lansing, Defendants in Error. Proof Service. Filed Feb'ry 6, 1906. John T. Athey, Clerk. Charl Edmund Pew, Attorney for Plaintiff in Error, Helena, Montana.

Endorsed on cover: File No. 20,147. Montana supreme cou Term No. 236. Edward H. Love, plaintiff in error, *vs.* Annie Fl hive and Andrew J. Lansing. Filed March 23d, 1906. File N 20,147.